THE LIABILITY OF A HUSBAND FOR SLANDER AND LIBEL COMMITTED BY HIS WIFE.—Defendant's wife had written a letter to plaintiff's employer, warning him that plaintiff was a thief. Because of this letter, plaintiff was discharged. In an action against the husband and wife for uttering a libel, held that where a wife uttered a libel without her husband's knowledge or participation he was not liable for punitive damages, though he was necessarily joined as a party defendant in the action because of the existence of the marital relation, and thereby became liable for the judgment in so far as it related to compensatory damages. *Price et ux.* v. *Clapp* (1907), — Tenn. —, 105 S. W. Rep. 864.

The husband's liability for his wife's torts at common law is ably discussed in the case of *Kosminsky* v. *Goldberg,* 44 Ark. 401. This common law liability as stated in the above case is as follows: The husband and wife are jointly liable and must be jointly sued for torts committed by the wife during coverture in three instances; first, when the husband is absent and the tort is committed without his knowledge or consent; second, when the husband is absent, but the tort is committed under his direction; third, when the husband is present, but the wife acts from her own volition. But where the husband is present and the act is committed by his command or encouragement he alone is liable. These being the rules at the old common law, the question arises whether the Married Women's Acts have discharged the husband from this liability. *Seroka* v. *Kattenberg,* 55 Law J. (N. S.), Q. B. D. 375, holds that the Married Women's Property Act of 1882 does not relieve a husband from his common law liability to be joined as a defendant in an action brought against his wife for a tort committed by her. In this case the action was brought to recover damages due to the wife's slander, and, as the husband was liable, it seems that the old common law rule still prevails in England.

In the United States the question is by no means settled. In *Baker* v. *Young,* 44 Ill. 42, 92 Am. Dec. 149, the court held that where a wife speaks slanderous words alone a verdict must be found against husband and wife. This decision did not settle the question in Illinois, as five years later the case of *Martin* v. *Robson,* 65 Ill. 129, 16 Am. Rep. 578, decided in 1872, held that since the passage of the act of 1869 the husband is no longer liable for the torts of his wife committed during coverture. This case was decided by an almost equally divided court, and a different construction was placed upon the Married Women's Acts than in *Baker* v. *Young,* supra. However, the decision in *Martin* v. *Robson* seems to have been followed ever since. The husband's liability for his wife's slanders was fixed in Indiana by *Yeates* v. *Reed,* 4 Blackf. (Ind.) 463, 32 Am. Dec. 43; *Mousler* v. *Harding,* 33 Ind. 176, 5 Am. Rep. 195. Statutes have since changed this liability so that a husband is no longer liable for the torts of his wife. *Indiana R. S.* (1897), § 7300.

The Iowa courts have held that the common law rule making the husband liable for the torts of his wife has not been changed by any provisions of the Iowa statutes. See *McElfresh* v. *Kirkendall,* 36 Iowa 224. In Massachusetts the husband's common law liability as held in *Austin* v. *Wilson,* 58

(4 Cush.) Mass. 273, has been abrogated by statute. (*Massachusetts P. S.*, 1882, p. 819.) The common law rule still prevails in Minnesota. *Morgan* v. *Kennedy*, 62 Minn. 348, 64 N. W. 912, 54 Am. St. Rep. 647, 30 L. R. A. 521. Similar holdings are found in Missouri. *Taylor* v. *Pullen*, 152 Mo. 434, 53 S. W. 1086; *Bruce* v. *Bombeck*, 79 Mo. App. 231. The law on this question is by no means settled in New York. *Laude* v. *Smith*, 6 Civil. Proc. R. (N. Y.) 51, hold that the husband is not a proper party in an action against a married woman for slander. However, the rule which seems to be most generally followed in New York is found in *Fitzgerald* v. *Quann*, 109 N. Y. 441, 17 N. E. 354. In that case the court held that the various statutes relating to married women have not abrogated the rule of the common law making the husband liable for the torts of his wife. The court also held that the Married Women's Acts must be strictly construed since they are in derogation of the common law.

The common law rule is still enforced in North Carolina. *Presnell* v. *Moore*, 120 N. Car. 390, 27 S. E. 27. A similar holding is found in Ohio. *Fowler* v. *Chichester*, 26 Ohio St. 9. Conflicting decisions are found in Pennsylvania. Before the passage of the Married Women's Acts of 1887 the husband was liable for his wife's slanders. See *Quick* v. *Miller*, 103 Pa. St. 67. After the passage of these acts it was held in *Kuklence* v. *Vocht*, 4 Pa. Co. Ct. R. 370, 21 Wkly. Notes Cas. 521, 13 Atl. 198, that a husband was no longer liable for slanderous words uttered by his wife. However, *Ridgeway* v. *Speelman*, 20 Pa. Co. Ct. R. 596, 7 Dist. R. (Pa.) 290, holds that the acts of June 8, 1893, repeal the acts of 1887 and the husband is still liable. From this decision it seems that the old common law doctrine is still followed in Pennsylvania. The decisions in Texas are governed by the common law. See *McQueen* v. *Fulgham*, 27 Tex. 463; *Zeliff* v. *Jennings*, 61 Tex. 458; *Patterson & Wallace* v. *Frazer*, — Tex. Civ. App. —, 93 S. W. 146.

On the other hand the courts of some states hold that the husband is not liable for the slanders uttered by his wife. *Prentiss* v. *Paisley*, 25 Fla. 927, 7 L. R. A. 640, holds that a married woman is personally liable for her torts. The question was settled in Kansas by the decision of *Norris* v. *Corkill*, 32 Kan. 409, 4 Pac. 862, 49 Am. Rep. 489. This case followed *Martin* v. *Robson*, supra. *Lane* v. *Bryant*, 100 Ky. 138, 37 S. W. 584, 36 L. R. A. 709, held that the liability of the husband at common law for the slander and libel of his wife was based on the idea that the husband had absolute dominion and control over his wife and her property, but as this idea no longer exists, having been changed by statute (*Kentucky Statutes*, March 15, 1894, § 2128), the husband should not be held liable for torts in which he did not aid, or with which he had nothing to do. In Louisiana it has been held that a husband, not shown to have been cognizant of the slanderous utterance of his wife, should not be liable therefor. *McClure* v. *McMartin*, 104 La. 496, 29 So. 227. The husband's liability in Maryland has been expressly abrogated by *Maryland Acts* (1880), ch. 253. The Michigan statutes are to the same effect. *Michigan C. L.* (1897), § 8677. The rule that the husband is liable for his wife's torts committed away from his presence and without his instigation was never adopted in Nebraska. See *Goken* v.

Dallugge, 72 Neb. 16, 101 N. W. 244. The New Hampshire court in *Harris* v. *Webster,* 58 N. H. 481, held that the husband is no longer liable for his wife's torts, because he no longer controls her property. In Vermont this liability has been expressly abrogated. *Story* v. *Downey,* 62 Vt. 243; *Vermont Statutes of 1894,* § 2648.

The question of damages seems to have been raised in but few cases. Although none are in point with the principal case so far as the measure of damages is concerned, yet exemplary damages have been awarded against the husband for his wife's slanders in a few cases. They were allowed in *Fowler* v. *Chichester,* 26 Ohio St. 9, and in *Patterson & Wallace* v. *Frazer,* — Tex. Civ. App. —, 93 S. W. 146. However, this latter case was reversed on a different ground. 94 S. W. 324. Before the husband's liability was abolished in Vermont exemplary damages were awarded in *Lombard* v. *Batchelder,* 58 Vt. 558, 5 Atl. 511. Nor will the damages be diminished even though the husband requires the wife to retract the slanderous utterances. *Mousler* v. *Harding,* supra.

Where the husband is liable the question has been raised whether the wife's separate estate should be subjected to the payment of the judgment. In commenting upon the case of *Seroka* v. *Kattenberg,* supra, the *Central Law Journal,* Vol. 23:364, says: "One aggrieved by the tort of a wife has under the act in question this advantage, he may sue both, and upon recovering a judgment may have it satisfied out of the separate estate of the wife, under the statute, or of the husband, under the common law, or out of both, and may exhaust both if necessary to satisfy the judgment." In the case of *McQueen* v. *Fulgham,* supra, the question was raised whether the wife's separate estate or the community property should be taken to satisfy the judgment. The question was not decided in that case, but in *Zeliff* v. *Jennings,* supra, it was held that the wife's separate estate should be first exhausted before the husband's property was taken. J. E. W.

SUFFICIENCY OF A VERDICT WHICH FAILS TO FIX THE TIME OF AN ATTEMPT TO COMMIT BURGLARY, THE PUNISHMENT VARYING WITH THE TIME.—The Supreme Court of Montana in *State* v. *Mish* (1907), — Mont. —, 92 Pac. Rep. 459, has recently decided an interesting point relative to the sufficiency of a verdict, which failed to find whether an attempt to commit burglary was made in daytime or in nighttime when punishment is graduated accordingly as the attempt is made in daytime or in nighttime. The case is important because many other states have statutes similar to those of Montana. Apparently, however, only one other case has arisen on a similar state of facts, and that case is in conflict with the principal case.

In the principal case the defendant was tried for an attempt to commit burglary. The jury returned a verdict of guilty. The court then imposed sentence for 7 1-2 years in the state prison. By the statutes of Montana (PENAL CODE, § 821) burglary is divided into two degrees. Burglary in the first degree is burglary committed in the nighttime. It is punishable by from one to fifteen years in the state prison. Burglary in the second degree is